Appeal No. 2008AP2937 **Cir. Ct. No. 2007CV32**

WISCONSIN COURT OF APPEALS
DISTRICT IV

MERCYCARE INSURANCE COMPANY AND MERCYCARE HMO, INC.,

PETITIONERS-RESPONDENTS,

V.

WISCONSIN COMMISSIONER OF INSURANCE,

RESPONDENT-APPELLANT.

FILED

Sept 3, 2009

David R. Schanker
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Dykman, P.J., Lundsten and Bridge, JJ.

The Wisconsin Commissioner of Insurance appeals from a judgment that reversed its decision and denied maternity coverage to two surrogate mothers. We certify this appeal to the Wisconsin Supreme Court to determine whether WIS. STAT. § 632.895(7) permits an insurer to exclude maternity coverage for an insured acting as a surrogate mother.[1] The answer to this question is determined, in part, by what level of deference, if any, should be accorded the Commissioner's decision. Guidance is also needed on this topic because it is not apparent from the case law to date what level of deference should be given to an agency's decision

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

when the issue is particularly within the agency's area of expertise and specialized knowledge, but the agency is construing a specific statute for the first time.

BACKGROUND

In 2002, MercyCare Insurance Company and MercyCare HMO, Inc. (collectively "MercyCare") filed a certificate with the Wisconsin Commissioner of Insurance that excluded "surrogate mother services" from pregnancy benefits without defining such services (the "2002 Contract"). The Commissioner approved the certificate. While covered by MercyCare, two women entered into agreements to be "gestational carriers" for other parents, and each subsequently became pregnant. The children were not in any way genetically linked to the women who carried them. Based on the language of the 2002 Contract, MercyCare denied coverage for the benefits received by both women during the course of their pregnancies. Third parties ultimately paid for the services provided to both women. One of the women filed a complaint regarding the coverage denial with the Office of the Commissioner of Insurance ("OCI").

While OCI was reviewing the denials, MercyCare filed a new policy form that revised the exclusions and contained a definition of "surrogate mother" excluding maternity coverage for insureds acting as surrogates (the "2005 Contract Form"). The Commissioner disapproved the 2005 Contract Form on the basis that it violated WIS. STAT. § 632.895(7), and was unfairly restrictive and discriminatory. MercyCare requested a hearing.

In February 2006, OCI issued a Notice of Hearing alleging that MercyCare violated WIS. STAT. § 632.895(7) when it denied coverage to the two surrogate mothers, and that the disapproval of the 2005 Contract Form was appropriate because the policy exclusions violated the mandated maternity

benefits of WIS. STAT. § 632.895(7), and were misleading and discriminatory under WIS. STAT. § 631.20. The case ultimately went before the Commissioner of Insurance, who decided the case on briefs.

The Commissioner concluded that "[t]he legislative history indicates that the statute's purpose is one of inclusiveness," and that "[t]he decision to become pregnant is an intensely personal decision. For OCI to give an insurer license to inquire into why a woman is pregnant or whether she intends to keep her baby would be improper." The Commissioner concluded that MercyCare could not deny benefits for medical services "to covered persons who act as gestational carriers or traditional surrogate mothers," and upheld the disapproval of the 2005 Contract Form.

MercyCare petitioned the Rock County Circuit Court for review of the decision. The circuit court reviewed the case *de novo*, and reversed the decision of the Commissioner of Insurance. The circuit court concluded that because the exclusion in the policy applied uniformly to all covered persons, "the statute clearly and unambiguously permits such an exclusion," and that the Commissioner had "exceeded its statutory authority in disapproving the certificate of insurance." The Commissioner then appealed.

ANALYSIS

STANDARD OF REVIEW

The Commissioner argues that we should apply "great weight" deference because OCI is charged with the administration of WIS. STAT. § 632.895(7), the agency has been administering and interpreting Wisconsin's insurance statutes "since at least 1933," the Commissioner's decision demonstrates

on its face that the agency employed its expertise, and the agency's interpretation of the statute will provide consistency.

MercyCare counters that review should be *de novo* because there can be no real dispute that the Commissioner has not previously interpreted the statutory language at issue here. MercyCare points to case law stating that *de novo* review is required when the agency decided a question that is "clearly one of first impression." *See, e.g.*, ***DOR v. River City Refuse Removal, Inc.***, 2007 WI 27, ¶35, 299 Wis. 2d 561, 729 N.W.2d 396.

We are uncertain which party is correct because both positions find support in the case law. For example, cases frequently repeat the rule that courts should defer to an agency decision only when its interpretation is "one of long-standing." *See, e.g.*, ***County of Dane v. LIRC***, 2009 WI 9, ¶16, 315 Wis. 2d 293, 759 N.W.2d 571 (citation omitted); ***National Motorists Ass'n v. OCI***, 2002 WI App 308, ¶11, 259 Wis. 2d 240, 655 N.W.2d 179. The "long-standing" requirement seemingly requires that the agency has previously interpreted the statutory language at issue. However, in at least some recent cases the supreme court has applied great weight deference giving little or no attention to the "long-standing" requirement. *See, e.g.*, ***Clean-Wis., Inc. v. PSC***, 2005 WI 93, ¶¶37-43, 112-16, 282 Wis. 2d 250, 700 N.W.2d 768; ***Hutchinson Tech., Inc. v. LIRC***, 2004 WI 90, ¶¶22-24, 273 Wis. 2d 394, 682 N.W.2d 343 (citing ***Crystal Lake Cheese Factory v. LIRC***, 2003 WI 106, ¶¶29-30, 264 Wis. 2d 200, 664 N.W.2d

651); ***Brown v. LIRC***, 2003 WI 142, ¶¶17-18, 267 Wis. 2d 31, 671 N.W.2d 279; ***Kitten v. DWD***, 2002 WI 54, ¶31, 252 Wis. 2d 561, 644 N.W.2d 649.[2]

Moreover, we have previously observed that the "long standing" language may be misleading. *See* ***Wisconsin Bell, Inc. v. PSC***, 2004 WI App 8, ¶17, 269 Wis. 2d 409, 675 N.W.2d 242 (Ct. App. 2003), *aff'd*, 2005 WI 23, 279 Wis. 2d 1, 693 N.W.2d 301. Furthermore, courts have reframed the "long-standing" requirement to mean something other than a long standing interpretation of particular statutory language. *See* ***id.***, ¶¶17-19 (summarizing and discussing cases); ***Citizens' Util. Bd. v. PSC***, 211 Wis. 2d 537, 551-52, 565 N.W.2d 554 (Ct. App. 1997) ("Although the PSC's determination of 'adequacy' ... is unique to this case, the agency's practice and methods ... are long-standing ....").

A closely related problem pertains to the rule that *de novo* review applies to agency decisions on questions that are clearly of first impression. A number of cases suggest that a question is *not* one of first impression—and therefore not subject to *de novo* review—simply because an agency is addressing a new fact situation for the first time. *See, e.g.*, ***Town of Russell Volunteer Fire Dept. v. LIRC***, 223 Wis. 2d 723, 733, 589 N.W.2d 445 (Ct. App. 1998); ***Barron Elec. Coop. v. PSC***, 212 Wis. 2d 752, 764 & n.8, 569 N.W.2d 726 (Ct. App. 1997). We question whether the approach should be any different when an agency is addressing particular statutory language for the first time. A new fact situation

[2] Some earlier-decided cases seem to take a stricter view. *See* ***UFE Inc. v. LIRC***, 201 Wis. 2d 274, 284-86, 548 N.W.2d 57 (1996) (declining to apply great weight deference when LIRC had issued only three previous decisions on a topic and only one of those decisions addressed the same "specific issue"); ***Local No. 695 v. LIRC***, 154 Wis. 2d 75, 83-84, 452 N.W.2d 368 (1990) (suggesting that an agency's interpretation of a statute must be "regular and repeated," "a course of uniform interpretation over a period of time").

may lead agency decision-makers to reasonably view familiar statutory language in a new light. Thus, both types of situations may result in questions of considerable novelty.

Some cases state that great weight deference should depend on whether an agency has previously interpreted a particular statutory "section" or "scheme." ***Clean Wisconsin***, 282 Wis. 2d 250, ¶116; ***Honthaners Rest., Inc. v. LIRC***, 2000 WI App 273, ¶12, 240 Wis. 2d 234, 621 N.W.2d 660. This too does not provide clear guidance as to whether the agency must have previously interpreted particular statutory language. Further confusion arises, in our view, because of statements in the case law that "due weight" deference is appropriate when the agency decided a question that is "very nearly" one of first impression. *See, e.g.*, ***Tannler v. DHSS***, 211 Wis. 2d 179, 184, 564 N.W.2d 735 (1997); ***Sauk County v. WERC***, 165 Wis. 2d 406, 413-14, 477 N.W.2d 267 (1991).

Given the lack of guidance and apparent conflicts in the case law regarding the proper standard of review when an agency interprets statutory language for the first time, we seek clarification from the supreme court.

EXCLUSION OF COVERAGE FOR SURROGATE MOTHERS

The statute at issue here requires uniformity in group disability insurance coverage for maternity. WISCONSIN STAT. § 632.895(7), provides:

> Every group disability insurance policy which provides maternity coverage shall provide maternity coverage for all persons covered under the policy. *Coverage required under this subsection may not be subject to exclusions or limitations which are not applied to other maternity coverage under the policy.*

(Emphasis added.) The parties dispute the meaning of the second sentence of the statute. MercyCare argues that the statute means that whatever maternity coverage is provided in the policy must be provided to all insureds. Under this view, MercyCare is free to deny surrogacy coverage if it denies that coverage to all insureds. The Commissioner reads the statute to require that, if an insurer provides coverage for various maternity care procedures, the insurer must provide that same coverage to all insureds, regardless of the circumstances of how or why they became pregnant. Under this interpretation, an exclusion for surrogate mothers is impermissible because it non-uniformly denies some insureds coverage that other insureds receive.

We note that MercyCare supports its position—that a subgroup of insureds may be excluded so long as that sub-group is consistently excluded—with examples that miss the mark. MercyCare points to exclusions for particular maternity-related procedures and services, such as elective abortions, delivery performed outside the service area late in a pregnancy term, or amniocentesis testing for the sole purpose of gender determination. These examples represent a uniform exclusion of a limited subset of procedures applied to all insureds. The exclusion for surrogate mothers, however, denies *all* maternity-related coverage on the basis of a distinction among insureds, namely, how or why the insured became pregnant. Seemingly more apt comparisons would be whether MercyCare could exclude maternity coverage for an insured who intends to keep a baby she gestated from an implanted embryo containing none of her own genetic material, or whether MercyCare could exclude maternity coverage for an insured who decides during a pregnancy to give up a biological child for adoption.

The Commissioner's argument also has its problems. MercyCare's discussion of the statutory history suggests that the legislature may have enacted

WIS. STAT. § 632.895(7) to prevent insurers from treating group insurance members, their spouses, and their dependent children differently for purposes of maternity coverage. If that was the legislature's intent, it is unclear at best whether the statute should be read to prohibit exclusion of maternity coverage for surrogate mothers. The question is what § 632.895(7) prohibits, not whether exclusion of maternity coverage for surrogate mothers would run afoul of some other authority.

In sum, we are not persuaded by the parties' arguments that either party has identified the only reasonable interpretation of WIS. STAT. § 632.895(7). Rather, we believe the statute is susceptible to competing reasonable interpretations. Accordingly, this case turns, in part, on the level of deference to be accorded the Commissioner's decision. Moreover, the underlying subject matter makes this a case that should be resolved by our State's highest court.